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had not been laid. On appeal, the court held that admission or exclusion of such evidence lay within the sound discretion of the trial judge and that his decision would not be reviewed because only a part of the evidence on which it was based appeared in the transcript. Earlier decisions of the Louisiana courts have even gone so far as to hold that there must be complete proof of the overt act to the satisfaction of the trial judge.[8]

Since, in a doubtful case, threats will furnish some evidence of justification for self-defence, and since the accused is justly entitled to present to the jury every piece of evidence which may assist it in judging of this fact upon which his guilt may depend, it is difficult to find any good reason for the exclusion of this evidence except where it has already been clearly shown that the defendant was the attacking party. The injustice of any overt act test is particularly obvious in a case where no direct evidence of the encounter is obtainable, while the extreme adaptation of the rule, requiring the accused actually to prove self-defence before presenting evidence of threats to aid in proving it, forces him to wait until such evidence is useless. Where, however, the overt act test is *res adjudicata,* the best rule that can be adopted is to admit the threats on any evidence of an overt act, however slight, and this has been done in some jurisdictions.[9] This insures a rule of uniformity, which can never obtain where the question is left wholly to the discretion of the trial judge, and, at the same time, eliminates the difficulties of a review on appeal presented by the principal case.

COLOR OF TITLE.—The importance of color of title[1] in the law of adverse possession is, that, while ordinarily the occupant must show actual possession of all the land claimed, he may acquire title to the whole tract by occupying only a part,[2] provided he has color of title to the whole.[3] Color of title has been, perhaps, best defined as "that which in appearance is title, but in reality is not."[4] A deed void on

[8]State *v.* Ford (1885) 37 La. Ann. 443, 460; State *v.* Harris (1893) 45 La. Ann. 842; State *v.* Wiggins (1898) 50 La. Ann. 330, 338; but *cf.* State *v.* Golden (1905) 113 La. 791. For a critical comparison of the inconsistent holdings of the Louisiana courts, see 1 Wigmore, Evidence, § 246 n. 13, p. 312. One court has held that, though the admissibility of threats lies in the discretion of the trial judge, he must admit them wherever there is any doubt as to who was the aggressor. Wilson *v.* State (1892) 30 Fla. 234.

[9]Allison *v.* U. S., *supra*; Garner *v.* State, *supra*; see People *v.* Scoggins (1869) 37 Cal. 676; Jackson *v.* State (1873) 65 Tenn. 452. As to whether the defendant's sworn statement of his defence is alone sufficient evidence of the overt act to pave the way for threats and reputation, see Hart *v.* State (1896) 38 Fla. 39.

[1]The doctrine of color of title is peculiar to the United States. See Tate *v.* Southard (1824) 10 N. C. 119.

[2]The kind of occupancy or possession which is requisite to constitute adverse possession naturally varies with the nature, situation, and uses of the property. See Richmond Iron Works *v.* Wadhams (1886) 142 Mass. 569.

[3]See 4 Columbia Law Rev., 605.

[4]Wright *v.* Mattison (1855) 59 U. S. 50.

any ground may give color of title.[5] But in one particular a colorable deed must measure up to the standard of a valid one, and that is in the proper description of the premises, the reason being that the whole purpose of color is to delimit the possession.[6] In some States, by statute, color of title not only enlarges the adverse claimant's possession, but also shortens the requisite time of occupation.[7]

Statutes in some States require good faith in a claim under color of title.[8] Whether good faith is necessary without such a statute is a moot question. The courts often say that it is,[9] but that there is a strong presumption of good faith, which is not rebutted merely by proof of knowledge of conflicting claims.[10] They treat good faith and color as separate questions, considering the former a question of fact for the jury, and the latter a question of law for the court.[11] On the other side are cases holding that good faith is quite unnecessary, and that it is enough if the disseisor's entry is hostile to all the world, whether he enters under claim of title or color of title.[12] It may well be argued, however, that *bona fides* is included in that "appearance" of title which is essential to color, and that, consequently, a deed does not give color if the facts and circumstances attending its execution clearly show that the party applying it had no confidence in it.[13]

In many States, a written instrument purporting to convey title is essential to color, either by statute,[14] or by judicial decision.[15] Other jurisdictions include as color any state of facts, resting in parol or in writing, which of itself shows the character and extent of the adverse claimant's possession.[16] A recent Indiana Case, *Hitt* v. *Carr* (Ind. App. 1915) 109 N. E. 456, following the latter rule, held that a parol gift of land constitutes color of title. There seems to be no good reason why a written instrument should be required. A colorable deed can no more give title than can an oral gift. Both are equally ineffective as a means of conveyance. Even those courts that usually require documentary evidence dispense with it in some cases, as where there is a descent cast.[17] If the grantee of a void deed is in by color of title, it would be strange that "one entering under an erroneous

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[5]Wright *v.* Mattison, *supra*; Chicago, R. I., & P. Ry. *v.* Allfree (1884) 64 Iowa 500.

[6]Crawford *v.* Verner (1905) 122 Ga. 814.

[7]See note in 15 L. R. A. [N. s.] 1223 *et seq.*

[8]Lee *v.* O'Quin (1898) 103 Ga. 355.

[9]Foulke *v.* Bond (1879) 41 N. J. L. 527; Davis *v.* Hall (1879) 92 Ill. 85; Livingston *v.* Peru Iron Co. (N. Y. 1832) 9 Wend. 511.

[10]Davis *v.* Hall, *supra.*

[11]Wright *v.* Mattison, *supra*; Lee *v.* O'Quin, *supra*; Hardin *v.* Gouveneur (1873) 69 Ill. 140.

[12]Lampman *v.* Van Alstyne (1896) 94 Wis. 417.

[13]See Beverly *v.* Burke (1851) 9 Ga. 440.

[14]Doyle *v.* Wade (1887) 23 Fla. 90; Converse *v.* Calumet River Ry. (1902) 195 Ill. 204.

[15]Tate *v.* Southard, *supra*; Allen *v.* Mansfield (1891) 108 Mo. 343, overruling Rannels *v.* Rannels (1873) 52 Mo. 108.

[16]Bell *v.* Longworth (1855) 6 Ind. 273; McCall *v.* Neely (Pa. 1834) 3 Watts, 69.

[17]See Hamilton *v.* Wright (1870) 30 Iowa, 480.

belief that he is heir to the person last seized should be deemed otherwise."[18] The only reason why a deed is necessary for color is to show the extent of the claim, and this may equally appear by oral evidence or matter *in pais*.[19]

THE DOCTRINE OF ANTICIPATORY BREACH IN NEW YORK.—The doctrine of anticipatory breach was first noted by the courts of New York in 1861;[1] but it was not squarely passed upon until 1870, in a case involving a contract to marry.[2] The decision of the court in that case seems to have been seriously influenced by the thought of the plaintiff's wounded feelings. Because of the peculiar nature of contracts to marry, it was hardly to be expected that the rule of this decision should be applied to cases where a different kind of contract was under consideration. Yet in a later case,[3] which involved a contract for personal services, the judge who wrote the opinion, reasoning by analogy from the *Burtis Case*, declared by way of *obiter*, that the plaintiff might recover for an anticipatory breach; and said that he was unable to see any appreciable distinction between a contract to marry and a contract for personal services. The other judges while concurring in the result reached, refused to express any views as to the soundness of the doctrine of anticipatory breach. It was intimated in the opinion, however, following a dictum to the same effect in the *Burtis Case*, that the same reasoning would scarcely be extended to mere promises to pay money. And so, merely on the strength of this same dictum in the *Burtis Case*, as a reading of the opinion will show, a comparatively recent case decided that there could be no anticipatory breach of a contract to pay money.[4] Some years after the decision in *Howard* v. *Daly*, in a case involving a contract for the sale and delivery of goods in future installments, it was held that the plaintiff was entitled to recover for an anticipatory breach.[5]

It is in these cases of installment contracts to deliver goods, that the courts have most frequently applied the doctrine of anticipatory breach. And the results are not wholly satisfactory. The difficulty seems to be due to the apparent failure to distinguish between entire

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[18]McCall *v.* Neely, *supra*, at p. 72.

[19]See dissenting opinion in Tenn. Coal, Iron & R. R. Co. *v.* Linn (1898) 123 Ala. 112.

[1]Crist *v.* Armour (N. Y. 1861) 34 Barb. 378.

[2]Burtis *v.* Thompson (1870) 42 N. Y. 246. While the doctrine of anticipatory breach can hardly be supported on principle, it was accepted in England in the case of Hochster *v.* De La Tour (1853) 2 E. & B. 678, and in the United States it has been adopted by the great weight of authority. See 4 Columbia Law Rev., 64. Pollock, Contracts (3rd Am. Ed.) 355 *et seq*, and note to that page: "It need hardly be said that the doctrine of anticipatory breach is peculiar to our law."

[3]Howard *v.* Daly (1875) 61 N. Y. 362. The court here found evidence of an actual breach, which was all that was necessary for the decision of the case. In another case decided the same year the court pointed out that the question was far from settled in this State. See Freer *v.* Denton (1875) 61 N. Y. 492.

[4]Tanenbaum *v.* Federal Match Co. (N. Y. 1905) 102 App. Div. 524.

[5]Windmuller *v.* Pope (1887) 107 N. Y. 674.